

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?
- (2) Did claimant provide timely notice of the accident pursuant to K.S.A. 44-520?

- (3) What is the nature and extent of claimant's injury and/or disability?
- (4) What was claimant's average weekly wage on the date or dates of accident?
- (5) Is claimant entitled to future medical treatment from these alleged accidental injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant alleges a series of accidental injuries to his upper back, neck, shoulders and upper extremities, beginning March 3, 1997, and continuing each and every working day thereafter. Claimant described the injury as occurring while holding a concrete hose on his head and shoulders. The hose, through which liquid cement is poured, has to be held and moved regularly. Claimant first had the hose on his shoulder and then on his hard hat. The hose would surge and spit out cement, jumping and jerking. Claimant began noticing what he described as a "crook" [sic] in his neck. This went on for several days when he started developing problems in his shoulder and right arm. Claimant continued working, and the condition continued to worsen.

By approximately the end of April 1997, claimant advised his supervisor Kyle of his problems. The first medical treatment provided to claimant was April 29, 1997. Claimant estimates that he would have told Kyle about the accident the day before or April 28, 1997. Claimant's condition continued to worsen. Claimant continued working for respondent at what appears to be the same duties until July 31, 1997.

Claimant was referred to the Wichita Clinic on April 29, 1997, where he saw Dr. Lygrisse, Dr. Buhr and Dr. Stein. He was eventually referred to Dr. John Estivo, who treated claimant through December 15, 1997. Claimant was released with restrictions on January 8, 1998. Dr. Estivo opined claimant had a 3 percent whole body functional impairment utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Estivo acknowledged claimant had a preexisting cervical condition but testified that the 3 percent impairment was strictly for the new injury. Dr. Estivo gave no opinion regarding what percentage of preexisting impairment claimant suffered. During his deposition, Dr. Estivo was provided a task analysis created by Jerry D. Hardin. After reviewing this task analysis, Dr. Estivo opined that claimant could not perform 78 percent of the tasks listed.

Claimant was referred to Dr. Pedro A. Murati, a board certified physical and rehabilitation specialist, by his attorney. Dr. Murati examined claimant on February 12, 1998. Dr. Murati diagnosed cervical strain of a chronic nature, with severe degenerative disc disease and degenerative joint disease, with bilateral C5 radiculopathy. He assessed claimant a 15 percent whole body functional impairment, utilizing the AMA Guides, Fourth Edition. He acknowledged claimant had a preexisting cervical condition, but provided no impairment rating for this preexisting condition, as he did not feel that the condition had interfered with claimant's daily activities prior to the accident with respondent. Dr. Murati was also provided Mr. Hardin's tasks list and agreed with Dr. Estivo that claimant could not perform seven out of the nine tasks on Exhibit A and seven out of the nine tasks on Exhibit B. This also computes to a 78 percent task loss. The task analysis provided by Mr. Hardin covered only the jobs worked by claimant with respondent. There were other jobs performed by claimant during the 15 years prior to claimant's accident, including work with the City of Wichita, McFadden Construction, Walten Construction, Ingraham Construction and Blouten Construction, as well as periods of self-employment performing concrete work and painting houses.

The tasks associated with these various jobs were not provided to Mr. Hardin, and no opinion was provided by any physician regarding claimant's ability to perform these tasks. Claimant did testify that the tasks associated with most of the construction work, as well as with the City of Wichita, included work similar to that performed with respondent. However, there were tasks associated with these jobs which were not included by Mr. Hardin in his task list and, therefore, were not considered by the physicians.

After leaving respondent's employment on July 31, 1997, claimant made minimal effort to seek additional employment. He did sign up with job service, but only consulted them on three occasions between departing respondent's employment and the time of the regular hearing in May 1998. When asked to describe his attempts at locating jobs, claimant could only identify two employers he had contacted, one being McFadden and the other being Nickerson Lawn Service. Claimant acknowledged he had filled out no job applications since leaving respondent's employment. He also acknowledged that he contacted no one regarding the jobs listed at job service, indicating he felt that he wasn't qualified for those jobs. Including the three trips to job service, claimant made only six job contacts since leaving respondent.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

Respondent contends claimant did not prove accidental injury arising out of and in the course of his employment on the date or dates alleged, but provides no contradictory evidence. Respondent argues that claimant is not a credible witness and, therefore, cannot be believed. However, claimant's testimony is uncontradicted and is not sufficiently incredible to not be believed. Unless shown to be untrustworthy, uncontradicted evidence would generally be considered determinative. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board finds claimant has proven accidental injury arising out of and in the course of his employment through his last day worked of July 31, 1997. While the date of accident is somewhat unclear, and claimant has alleged different dates of accident at different times, it appears as though claimant continued doing the same or similar work through his last date of employment of July 31, 1997. The Appeals Board, therefore, finds pursuant to Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), that the most appropriate date of accident would be claimant's last day of work with respondent, being a series of accidents through July 31, 1997. See *a/so* Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).

K.S.A. 44-520 requires that an employer be given notice of accident within 10 days after the accident. As claimant contacted respondent in April 1997 seeking medical treatment, and was referred by respondent for authorized medical care, the Appeals Board finds that notice was provided in a timely fashion pursuant to K.S.A. 44-520.

Claimant's average weekly wage varied substantially. Respondent argues because claimant's hourly wage was so inconsistent, the only way to provide an accurate average weekly wage is to total all of the monies earned by claimant for the 26 weeks prior to the accident, and average those wages. This would result in a \$328.51 average weekly wage. However, claimant was hired as a full-time employee and, on the date of accident of July 31, 1997, was earning \$10 an hour. Claimant was a full-time hourly employee, and pursuant to K.S.A. 44-511, the number of hours constituting an ordinary work week in claimant's employment with respondent would be 40 hours per week. The Appeals Board, therefore, finds that, based upon a \$10 per hour wage and a 40-hour per week work schedule, claimant's average weekly wage is \$400 per week as found in the Award.

With regard to the nature and extent of claimant's injury and disability, the Appeals Board considers the testimony of Dr. Murati to be the more credible. While Dr. Estivo assessed claimant only a 3 percent functional impairment, he did assess substantial restrictions to claimant's ability to perform work. The Appeals Board does not find it convincing that Dr. Estivo assessed such a small whole body functional impairment while restricting claimant from substantial labors. The opinion of Dr. Murati that claimant has a 15 percent whole body functional impairment is the more persuasive opinion and is adopted by the Appeals Board for the purpose of this Award.

With regard to the claimant's entitlement to a substantial work disability under K.S.A. 1997 Supp. 44-510e, the Appeals Board must consider claimant's request in light of the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, claimant failed to make a good faith effort to obtain post-injury employment. The Court of Appeals held that, if a claimant does not put forth a good faith effort, post injury, to obtain employment, then the trier of fact is obligated to impute a wage based upon claimant's wage earning ability.

In this instance, claimant provided little true effort to find a job after leaving respondent. His contacts with job service were minimal and his actual employment contacts outside job service were practically nonexistent. Claimant filled out no applications and made only a total of six contacts, including job service, during the nearly ten-month period after leaving respondent and leading up to the regular hearing. The Appeals Board, therefore, finds pursuant to the policies set forth in Copeland that claimant failed, post injury, to make a good faith effort to find appropriate employment, and therefore a wage should be imputed.

Mr. Hardin, in his evaluation of claimant, found claimant capable of earning \$8 per hour over a 40-hour week. This computes to a \$320 post-injury wage earning ability. When compared to claimant's \$400 average weekly wage, this results in a wage loss of 20 percent.

K.S.A. 1997 Supp. 44-510e obligates that the trier of fact average the claimant's wage loss with the loss of ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident. This task loss, which shall be expressed as a percentage, must be presented in the opinion of the physician.

In this instance, both Dr. Estivo and Dr. Murati had the opportunity to review the task loss analysis of Mr. Hardin. Both agreed, based upon that analysis, that claimant has a 78 percent task loss. However, the analysis provided by Mr. Hardin is incomplete. Several jobs performed by claimant during the 15-year period preceding claimant's accident were not included in the analysis. Several tasks, involved not only in concrete work but also during claimant's two periods of self-employment and claimant's substantial period of employment with the City of Wichita, were omitted from Mr. Hardin's task opinion. In order for the physicians to provide a credible opinion as to claimant's ability to perform work tasks, the information upon which their opinions are based must be accurate. The Appeals Board finds the information provided to Mr. Hardin was incomplete and the opinions expressed by the doctors when based upon an incomplete and inaccurate task loss cannot be given credence. Therefore, claimant has failed in his burden of proving what task loss he has suffered as a result of the injuries with respondent.

K.S.A. 1997 Supp. 44-510e obligates that the trier of fact average the task loss and the wage difference in computing a work disability. The zero percent task loss, when averaged with claimant's 20 percent loss of wage earning ability, computes to a 10 percent permanent partial general body disability. K.S.A. 1997 Supp. 44-510e requires the extent of permanent partial disability to be not less than the percentage of claimant's functional impairment. Here, the Appeals Board has found claimant to have a 15 percent whole body functional impairment based upon the opinion of Dr. Murati. Because the 10 percent whole body work disability is less than claimant's functional impairment, this claimant would be entitled to his functional impairment.

The Administrative Law Judge granted claimant future medical treatment upon proper application to the Director. As the Appeals Board has affirmed the Administrative Law Judge's finding that claimant proved accidental injury arising out of and in the course of his employment, claimant's entitlement to future medical care upon application to and approval by the Director is also affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated November 12, 1998, should be, and is hereby, modified, and an award is granted in favor of the claimant, Edward L. Atkinson, and against the respondent, Major, Inc., and its insurance carrier, Continental National American Group, for an injury suffered through July 31, 1997, and based upon an average weekly wage of \$400 per week, for a 15 percent permanent partial disability to the body as a whole.

Claimant is entitled to 24 weeks of temporary total disability compensation at the rate of \$266.68 per week totaling \$6,400.32, followed by 60.9 weeks of permanent partial disability compensation at the rate of \$266.68 per week totaling \$16,240.81, for a total award of \$22,641.13, all of which is due and owing as of the date of this award and ordered paid in one lump sum minus any amounts previously paid.

Claimant is entitled to his outstanding medical, unauthorized medical up to the statutory limit, and future medical upon proper application to and approval by the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Court Reporting Service	
Discovery Deposition of Edward Atkinson	\$230.65
Deposition of John Estivo, D.O.	Unknown

Ireland Court Reporting Transcript of Regular Hearing	\$247.12
Barber & Associates Deposition of Pedro A. Murati, M.D.	\$157.20
Deposition of Jerry D. Hardin	\$222.00

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

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BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
D. Steven Marsh, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director